U.S. Department of Homeland Security
20 Mass. Ave., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

D7

NOV 23 2004

FILE: WAC 02 099 54233 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is described as engaging in the business of import, export, and manufacturing. It seeks authorization to employ the beneficiary temporarily in the United States as its chief executive officer at an annual salary of $80,000. The director determined that the petitioner had not established that a qualifying relationship exists between the U.S. company and the foreign company.

On appeal, counsel provides new evidence regarding the ownership of the U.S. company and asserts that the petitioner is a branch and an affiliate of the foreign company and that they have a qualifying relationship.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

> (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
>
> (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

> (A) Sufficient physical premises to house the new office have been secured;
>
> (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
>
> (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
>
> > (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
> >
> > (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

At issue in this proceeding is whether a qualifying relationship exists between the petitioning company and the foreign company.

Citizenship & Immigration Services (CIS) regulations at 8 C.F.R. § 214.2(l)(ii)(G) define the term "qualifying organization" as follows:

> *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
>
> (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
>
> (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
>
> (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

8 C.F.R. § 214.2(l)(ii)(I) states:

> *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

8 C.F.R. § 214.2(l)(ii)(J) states:

> *Branch* means an operating division or office of the same organization housed in a different location.

8 C.F.R. § 214.2(l)(ii)(K) states:

> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

8 C.F.R. §214.2(l)(ii)(L) states, in pertinent part:

> *Affiliate* means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

> (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner, Two Way Impex, Inc., is located in California and was incorporated in Nevada on May 1, 2001. It filed the instant petition in January 2002. The petitioner claims to be a branch of the foreign entity, [redacted] located in Nairobi, Kenya. In support of this claim, the petitioner stated that the foreign company owns 100 percent of the petitioner. The petitioner provided a memorandum and article of association for the foreign company. This document indicated that there were the following two shareholders [redacted] wning 500 shares and [redacted] the beneficiary, owning 500 shares.

On June 1, 2002, the director requested the following additional evidence of ownership and control:

> The U.S. company's Notice of Transaction Pursuant to Corporations Code Section 25102(f) showing the total offering amounts; the minutes of the organizational meeting of the U.S. company that lists all the shareholders and the number of shares owned; the U.S. company's stock ledger showing all stock certificates issued to the present date, including total shares of stock sold, names of shareholders, and purchase price.

On August 29, 2002, the petitioner responded to the director's request for evidence. The petitioner provided the minutes of the organizational meeting of the U.S. company that lists all the shareholders and the number of shares owned. Additionally, the petitioner provided the U.S. company's stock ledger, dated May 4, 2001, showing all stock certificates up to the time of the response, including total shares of stock sold, names of shareholders and purchase price. These documents indicate the following stockholders and amount of shares held:

[redacted]	9,750 shares
	6,000 shares
	4,000 shares
	5,250 shares

On October 22, 2002, the director denied the petition. The director found that the record indicated that the U.S. company is owned by the above listed four owners. The foreign company is owned equally [redacted] The director stated the evidence of the record does not reflect that the U.S. entity is a "branch" defined as "operating division or office" of the foreign entity. The director found the U.S. entity is owned and controlled by individuals and another entity.

The director also considered whether the U.S. entity and foreign entity could be considered affiliates. However upon review of the evidence, the director concluded that the record does not show that the U.S. and foreign entities are owned and controlled by the same individual or the same group of individuals with the same proportion of each entity. Therefore the evidence fails to demonstrate a qualifying relationship.

On appeal, counsel explains that two of the investors, [redacted] "were time-limited investors." Counsel furthers asserts:

> both investments were limited for a period of 1 year and had a maturity date of 10/01/02. Upon maturity, all amounts invested by the above named investors were to be returned with an additional 15% interest to the said investors no later than 30 days from the date of maturity. Upon payment of the monies by the corporation, all issued stock; i.e. 4000 of Ms [redacted] shares and 6000 of [redacted] shares would be return to [redacted] and [redacted] in such a manner as to give them equal shares of the company's stock.

Counsel submitted a resolution dated June 1, 2001, stating the above terms signed by [redacted] Counsel claims that both the U.S. entity and foreign entity are equally owned by the same individuals. Counsel also states "[b]oth entities are therefore basically the same organization and therefore the US entity; Two way Impex qualifies as a 'branch' of the foreign entity for the purposes of visa classification."

Counsel's arguments are not persuasive. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this immigrant visa classification. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988)(in immigrant visa proceedings). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I & N at 595.

The regulation at 8 C.F.R. § 214.2(l)(3)(viii) specifically allows the director to request such other evidence as the director may deem necessary. While the petitioner has submitted minutes of the organization and the stock ledger for the U.S. entity, the petitioner did not submit the requested Notice of Transaction. Additionally, the AAO notes that the petitioner did not submit copies of the stock certificates evidencing ownership in the U.S. company. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On appeal, counsel submits evidence that changes the ownership of the U.S. entity. This "resolution" was not submitted with the initial petition or when the director raised concerns about the ownership of the U.S. entity and offered the petitioner a chance to submit additional evidence. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Evidence that the petitioner creates after CIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice.

Furthermore, if significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence seems to change the ownership of the petitioner. Therefore, the analysis of the qualifying relationship will be based on the evidence of ownership submitted with the initial petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the

petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

In defining the nonimmigrant classification, the regulations specifically provide for the temporary admission of an intracompany transferee "to the United States to be employed by a parent, *branch*, affiliate, or subsidiary of [the foreign firm, corporation, or other legal entity]." 8 C.F.R. § 214.2(l)(1)(i) (emphasis added). The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). CIS has recognized that the branch office of a foreign corporation may file a nonimmigrant petition for an intracompany transferee. *See Matter of Kloetti*, 18 I&N Dec. 295 (Reg. Comm. 1981); *Matter of Leblanc*, 13 I&N Dec. 816 (Reg. Comm. 1971); *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970); *see also Matter of Penner*, 18 I&N Dec. 49, 54 (Comm. 1982)(stating that a Canadian corporation may not petition for L-1B employees who are directly employed by the Canadian office rather than a United States office). When a foreign company establishes a branch in the United States, that branch is bound to the parent company through common ownership and management. A branch that is authorized to do business under United States law becomes, in effect, part of the national industry. *Matter of Schick*, 13 I & N at 649-50.

Probative evidence of a branch office would include the following: a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies IRS Form 941, Employer's Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for office space in the United States; and finally, any state tax forms that demonstrate that the petitioner is a branch office of a foreign entity.

If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). If the claimed branch is incorporated in the United States, CIS must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer.

The record clearly indicates that the petitioning enterprise does not maintain a qualifying "branch" relationship with the overseas company. The evidence indicates that the foreign company is owned by two individuals. The U.S. petitioner is owned by three individuals and a business entity. The petitioner was incorporated in Nevada and is a distinct legal entity, separate from the foreign entity. Accordingly, the petitioner is not a branch and is not "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2 (l) (1) (ii) (J). In addition, there is no single individual or parent entity with ownership and control of both companies that would qualify the two as affiliates. 8 C.F.R. § 214.2 (l) (1) (ii) (L) (*1*). There is no direct evidence in the record to support the petitioner's claim that the foreign entity and the petitioner have the same owners. Consequently, it must be concluded that the petitioner has failed to demonstrate a qualifying relationship with a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). For this reason, the petition may not be approved.

Additionally, the record describes the beneficiary as the stockholder of 20 percent of the petitioning company and 50 percent of the foreign company. 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In this case, the petitioner has not furnished evidence that the beneficiary's services are for a temporary period and that the beneficiary will be transferred abroad upon completion of the assignment. As the appeal will be dismissed, these issues need not be examined further.

Beyond the decision of the director, the petitioner provided insufficient evidence to determine whether the petitioner has established that the beneficiary will be employed primarily in a managerial or executive capacity. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary has been or will be managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy. Further, the petitioner's evidence is not persuasive in establishing that the beneficiary has been or will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties. Based on the evidence submitted, it cannot be found that the beneficiary has been employed in a primarily executive or managerial capacity.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.